

BellSouth Telecommunications, Inc.
Legal Department
1600 Williams Street
Suite 5200
Columbia, SC 29201

patrick.turner@bellsouth.com

Patrick W. Turner
General Counsel-South Carolina

803 401 2900
Fax 803 254 1731

June 14, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

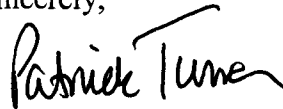
Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended
Docket No. 2005-57-C

Dear Mr. Terreni:

Enclosed for filing are an original and ten copies of BellSouth Telecommunications, Inc.'s Motion to Strike All Testimony Presented by Mr. Hamilton Russell, III in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this notice as indicated on the attached Certificate of Service.

Sincerely,



Patrick W. Turner

PWT/sgm
Enclosures
cc: All Parties of Record
DM5 # 589521

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

In the Matter of)
)
Joint Petition for Arbitration of)
)
NewSouth Communications Corp.,)
NuVox Communications, Inc.)
KMC Telecom V, Inc., KMC Telecom III LLC, and)
Xspedius Communications, LLC on Behalf of its)
Operating Subsidiaries Xspedius Management Co.)
Switched Services, LLC, Xspedius Management Co.)
Of Charleston, LLC, Xspedius Management)
Co. of Columbia, LLC, Xspedius Management Co.)
Of Greenville, LLC, and Xspedius Management Co.)
Of Spartanburg, LLC)
)
Of an Interconnection Agreement with)
BellSouth Telecommunications, Inc.)
Pursuant to Section 252(b) of the)
Communications Act of 1934, as Amended)
)

Docket No. 2005-57-C

**MOTION TO STRIKE ALL TESTIMONY PRESENTED BY
MR. HAMILTON RUSSELL, III**

For the reasons set forth below, BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests the Public Service Commission of South Carolina ("the Commission") to enter an Order striking all of the testimony presented by Hamilton ("Bo") Russell, III (including without limitation Direct Testimony, Rebuttal Testimony, summaries, and responses to questions during the hearing) from the record in this docket.

INTRODUCTION

On June 14, 2005, counsel for the Joint Petitioners sent a letter to BellSouth stating that on May 18, 2005, Mr. Russell accepted a position with the law firm of

Nelson, Mullins, Riley & Scarborough, L.L.P. (“Nelson Mullins”). The letter further states that as of the date of the hearing in this docket, Mr. Russell had performed work on behalf of certain clients of Nelson Mullins other than BellSouth.¹ Although Mr. Russell was employed by Nelson Mullins when his pre-filed Rebuttal Testimony was submitted in this docket, that testimony does not mention his employment with the firm.² Moreover, although Mr. Russell was employed by the firm when he testified during the June 1, 2005 hearing in this docket, this fact was not brought to the attention of the Commission or the parties either before or during the hearing.³ Accordingly, Mr. Russell’s testimony regarding his employment is not complete and, therefore, it is inaccurate.

This inaccuracy is material, and it significantly prejudices BellSouth’s rights in this docket. Nelson Mullins represents BellSouth in numerous legal matters and governmental affairs issues in South Carolina, and it has done so for many years. Thus, at the time Mr. Russell’s Rebuttal Testimony was filed and at the time he testified on

¹ The letter, a copy of which is attached as Exhibit A, also states that Mr. Russell resigned from his position as Vice President of Legal Affairs at NuVox on June 6, 2005 and that on the date of the hearing, Mr. Russell was working on certain projects for NuVox in order to complete those projects on or Before June 6, 2005.

² The Rebuttal Testimony that the Joint Petitioners pre-filed on May 23, 2005, states that Mr. Russell is “employed by NuVox as Vice President, Regulatory and Legal Affairs,” (Rebuttal Testimony at 5), and it expressly reaffirms the accuracy of Mr. Russell’s direct testimony “regarding [his] position at NuVox/NewSouth” and regarding his “educational and professional background.” (Rebuttal Testimony at 5). The Direct Testimony that the Joint Petitioners pre-filed on May 11, 2005, states that Mr. Russell is “employed by NuVox as Vice President, Regulatory and Legal Affairs,” (Direct Testimony at 8), and that in that position, he is “responsible for legal and regulatory issues related to or arising from NuVox’s purchase of interconnection, network elements, collocation and other services from BellSouth.” (Direct Testimony at 8).

³ The Joint Petitioners submitted an Errata Sheet that made changes or corrections to their Pre-Filed Direct and Rebuttal Testimony, but nothing in that Errata Sheet addresses the fact that Mr. Russell is employed by the firm. Exhibit B to this Motion is a copy of this Errata Sheet.

behalf of the Joint Petitioners in the hearing, Mr. Russell had a conflict of interest that prohibited him from doing so without BellSouth's consent. BellSouth did not provide such consent. In fact, BellSouth was not aware of the facts that created this conflict of interest until after the hearing was concluded. Had BellSouth been aware of these facts prior to the hearing, BellSouth would have objected to Mr. Russell's continuing participation in this docket, and the Commission and the parties would have had an opportunity to address the situation before BellSouth's rights were irreparably prejudiced.

Unfortunately, that did not happen. In light of the resulting and undeniable prejudice to BellSouth's rights, BellSouth respectfully moves that the Commission strike all of Mr. Russell's testimony (including without limitation his Direct Testimony, Rebuttal Testimony, summaries, and responses to questions during the hearing) from the record in this docket.

ARGUMENT

A. **Because Mr. Russell's Law Firm Represents BellSouth in Numerous Litigation Matters and Governmental Affairs Issues, Mr. Russell Was Prohibited From Presenting His Testimony Against BellSouth In This Docket.**

The Rules of Professional Conduct that govern attorneys practicing in South Carolina are set forth in Rule 407 of the South Carolina Appellate Court Rules. These Rules provide that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 . . .”⁴ Rule 1.7, in turn, provides that “[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believed that the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.”⁵

⁴ Rule 1.10(a)(emphasis added).

⁵ Rule 1.7(a)(emphasis added). It is beyond dispute that as a member of the Nelson Mullins firm, Mr. Russell would have been prohibited from acting as counsel and sponsoring a NuVox witness who presented the legal and policy testimony that Mr. Russell himself presented in this proceeding – that prohibition does not evaporate when Mr. Russell takes the stand and presents that very same testimony that he would have been prohibited from sponsoring as an attorney. Rules 1.7(a) and 1.10(a), therefore, prohibit Mr. Russell's testimonial advocacy on behalf of NuVox in this docket.

1. Mr. Russell's Pre-Filed Testimony and the Testimony He Presented Live During the Hearing is "Directly Adverse to" BellSouth.

The purpose of both Mr. Russell's Direct Testimony and his Rebuttal Testimony is "to offer support for the Joint Petitioners' Position" (and thus necessarily to oppose BellSouth's position) on various unresolved issues in this docket.⁶ In particular, Mr. Russell's testimony presents legal and/or policy arguments in favor of the Joint Petitioners' position (and "directly adverse" to BellSouth's position) on what language should be incorporated into the parties' interconnection agreement to address matters such as: how the term "end user" should be defined; the scope of "limitation of liability" provisions; the definition of "indirect, incidental or consequential damages"; the scope of language addressing indemnification; the scope of venue selection clauses; the interpretation of FCC rulings regarding the scope of BellSouth's "commingling" obligations; the scope of BellSouth's obligations under federal law to provide line conditioning; and the scope of the audit language in the agreement.⁷

The following excerpts show that Mr. Russell's testimony advocates NuVox's legal and policy position on various issues and, in many cases, attacks BellSouth's legal and policy position on those issues:

"From a legal perspective, BellSouth's newly proposed definitions [of "end user"], could unlawfully restrict the manner in which Joint Petitioners use UNEs," and "there is no apparent 'legal or policy basis to support BellSouth's'" proposed language;⁸

"BellSouth is simply searching for any means to avoid a new limitation of liability clause," and it is "simply time to hold BellSouth accountable for

⁶ See Direct Testimony at 10; Rebuttal Testimony at 6.

⁷ This list includes some, but not all, of the issues Mr. Russell addressed in his pre-filed testimony and/or during the hearing. Some of these issues have been moved to the generic proceeding for resolution.

⁸ Rebuttal Testimony at 13-14.

its own negligence and to stop BellSouth from shifting these costs to its competitors.”⁹

“BellSouth is seeking an unfair competitive advantage over Joint Petitioners” and “provides no legal or sound policy basis for [its] position.”¹⁰

“BellSouth’s proposed language is anticompetitive and unnecessary – and it should be rejected.”¹¹

“BellSouth’s reliance [on the FCC’s *TRO* errata] is misplaced,” there is “no FCC rule or order that states that BellSouth is permitted to place commingling restrictions on section 271 elements,” and “it is absolutely clear that the FCC did not find that ILECs such as BellSouth are not required to commingle section 271 elements with section 251 UNEs,”¹² and

“The FCC’s rules, however, do not support BellSouth’s position [regarding line conditioning].”¹³

Mr. Russell’s advocacy for NuVox and against BellSouth was even more apparent in his live testimony during the hearing, but BellSouth cannot yet cite to that testimony because the hearing transcript is not yet available.

2. The “Imputation” Provisions of Rule 1.10 Prohibited Mr. Russell from Proffering His Pre-Filed Direct and Rebuttal Testimony and from Presenting His Live Testimony Against BellSouth During the Hearing.

Mr. Russell was a member of the Nelson Mullins law firm: when his pre-filed Rebuttal Testimony was submitted; when he verified both his prefiled Direct and his pre-filed Rebuttal testimony prior to their being submitted into the record of this docket;

⁹ Rebuttal Testimony at 18.

¹⁰ Rebuttal Testimony at 20.

¹¹ Rebuttal Testimony at 24.

¹² Rebuttal Testimony at 37, 38

¹³ Rebuttal Testimony at 41. BellSouth firmly disagrees with Mr. Russell’s testimony each of these positions – and that is exactly the point. Upon becoming a member of a law firm that represents BellSouth’s interests in numerous matters, Mr. Russell had an obligation not to offer legal and policy testimony that is directly adverse to BellSouth’s interest.

when the Joint Petitioners submitted their Errata Sheet during the hearing; and when Mr. Russell testified on behalf of the Joint Petitioners (and adverse to BellSouth) at the hearing. The fact that Mr. Russell was employed by the firm, however, was not disclosed in Mr. Russell's pre-filed Rebuttal Testimony, in the Joint Petitioners' Errata Sheet; or at any time during the hearing.¹⁴ Moreover, BellSouth was not aware of Mr. Russell's association with Nelson Mullins until after the hearing in this docket was over; BellSouth was not consulted about Mr. Russell's conflict of interest prior to the hearing, and BellSouth did not consent to Mr. Russell's representing NuVox in this docket.

Rule 1.7(a) prohibits any Nelson Mullins attorney that represents BellSouth from representing Nuvox in this docket unless both NuVox and BellSouth consent to such representation after consultation. Rule 1.10, in turn, imputes that same prohibition to all members of the firm, including Mr. Russell. Clearly, Mr. Russell was prohibited from testifying against BellSouth in this docket.

B. In Light of the Prejudice to BellSouth, the Commission Should Strike Mr. Russell's Testimony in its Entirety.

Had BellSouth been aware of Mr. Russell's employment with Nelson Mullins prior to or during the hearing, BellSouth would have objected to his continued participation in this docket. In that case, Mr. Russell would not have been allowed to verify his Direct or Rebuttal Testimony at the hearing and, therefore, that testimony would not have become part of the record in this docket. Nor would Mr. Russell have been allowed to offer summaries, respond to questions by the Office of Regulatory Staff

¹⁴ In light of the obvious conflict of interest issues created by his recent employment with the firm, Mr. Russell at a minimum should have brought the fact of that employment to the attention of the Commission and the parties. *See generally* Rules 3.3 and 8.4(d)&(e) of the South Carolina Rules of Professional Conduct.

and the Commissioners, or otherwise participate in this docket. In order to put BellSouth in the position it would occupy if the facts regarding Mr. Russell's conflict of interest had been disclosed on a timely basis, BellSouth respectfully requests that the Commission strike all of Mr. Russell's testimony (including without limitation Direct Testimony, Rebuttal Testimony, summaries, and responses to questions during the hearing) from the record in this docket.

This remedy is particularly appropriate given that Mr. Russell is the only one of the Joint Petitioner's witnesses from whom the Commission heard live testimony on many issues in this docket. Accordingly, it is Mr. Russell whose credibility and biases the Commission would consider with regard to the issues he sponsored. In most cases, the Commission's determinations of the credibility or bias of a witness or of the weight the Commission decides to give to a witness' testimony will not be disturbed by a reviewing court.¹⁵ It clearly is prejudicial to BellSouth for the Commission to make such determinations based on the live testimony of a witness who never should have testified in this docket.¹⁶

¹⁵ See generally *Milliken & Co. v. South Carolina Employment Security Comm'n*, 468 S.E.2d 638, 639 (S.C. 1995) ("on questions of witness credibility we defer to the judgment of the agency"); *Armstrong v. Union Carbide*, 417 S.E.2d 597, 599 (S.C. Ct. App. 1992) ("The Workers' Compensation Commission is the factfinder in a workers' compensation case and makes the final determination of witness credibility and the weight to be given evidence."). Cf. *State v. Needs*, 508 S.E.2d 857, 861 (S.C. 1999) ("Courts presume a witness to be competent because bias or other defects in a witness's testimony – revealed primarily through cross examination – affect a witness's credibility and may be weighed by the factfinder.").

¹⁶ Under normal circumstances, BellSouth would also request that the Commission summarily rule in its favor on each of the issues that Mr. Russell sponsored in this docket on the grounds that no evidence in the record supports any ruling adverse to BellSouth on those issues. BellSouth is not making such a motion at this time, however, because in this joint proceeding, much of the Pre-Filed Testimony submitted by the Joint Petitioners was sponsored not only by Mr. Russell, but by other Joint Petitioner witnesses as well.

CONCLUSION

For the reasons set forth above, BellSouth respectfully requests the Commission to enter an Order striking all of the testimony presented by Mr. Russell (including without limitation Direct Testimony, Rebuttal Testimony, summaries, and responses to questions during the hearing) from the record in this docket.

Respectfully submitted, this 14th day of June, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Patrick W. Turner", written over a horizontal line.

PATRICK W. TURNER
Suite 5200
1600 Williams Street
Columbia, South Carolina 29201
(803) 401-2900

EXHIBIT A

ELLIS LAW HORNE

John J. Pringle, Jr.
Direct dial: 803/343-1270
jpringle@ellislawhorne.com

June 14, 2005

VIA FACSIMILE 254-1731 AND FIRST-CLASS MAIL SERVICE

Patrick W. Turner, Esquire
BellSouth Telecommunications, Inc.
1600 Williams Street
Suite 5200
Columbia SC 29201

RE: Joint Petition for Arbitration of NewSouth Communications, Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, **Docket No. 2005-57-C, Our File No. 803-10208**

Dear Patrick:

I wanted to make you aware of the following: Bo Russell resigned from his position as Vice President of Legal Affairs of NuVox Communications, Inc. ("NuVox Communications") on June 6, 2005. Mr. Russell was an employee of NuVox Communications at the time of his testimony in the above-referenced proceeding, and he appeared as he had done in seven other states in the BellSouth region, providing testimony on the same issues as he did in those other state arbitration proceedings.

On May 18, 2005, Mr. Russell accepted a position with Nelson, Mullins, Riley & Scarborough, LLP ("Nelson Mullins"). As of the date of the hearing in this Docket, Mr. Russell had performed work on behalf of certain clients of Nelson Mullins. However, Mr. Russell was also working on certain projects for NuVox during that time in order to complete those projects on or before June 6, 2005, and remained Vice President of Legal Affairs for NuVox through that date. Mr. Russell has never performed any work on behalf of BellSouth Telecommunications, Inc., or any of its parent companies, affiliates, or subsidiaries (collectively referred to as "BellSouth").

Moreover, it is my understanding that Nelson Mullins did not participate in any arbitration proceedings on behalf of NuVox Communications, Inc., BellSouth, or in any other capacity.

With kind regards, I am

Yours truly,



John J. Pringle, Jr.

cc: Hamilton E. Russell, Esquire
Riley Murphy, Esquire

EXHIBIT B

NUVOX / NEWSOUTH / XSPEDIUS - BELLSOUTH ARBITRATION

JOINT PETITIONERS' SOUTH CAROLINA PRE-FILED TESTIMONY ERRATA SHEET JUNE 1, 2005

Joint Petitioners' Direct Testimony filed May 11, 2005

PAGE:LINE	ERRATA/REFERENCE	REVISION
23	"...dominance by one party, in commercial..."	Delete comma after "party"
32	"...on its own generalization, and misconception of Joint Petitioners' tariffs."	Delete comma after "over-generalization"
37	"...Agreement to the extent cased by the providing..."	Change "cased" to "caused"
42	"...or to waiting for the FCC, to decide whether..."	Delete comma after "FCC"
46	"...should not construed to be..."	Change to "should not be construed to be"
50	"...unless they agree to a limitation or exception, we have no revised our language..."	Add period between "exception" and "we" and change "w" on "we" to "W"
78	"...pull-the-plug remedies in BellSouth's, proposal creates..."	Delete comma after "BellSouth's"

Joint Petitioners' Rebuttal Testimony filed May 23, 2005

PAGE:LINE	ERRATA/REFERENCE	REVISION
27:7	"...negotiations session..."	Change to "negotiation sessions"
33:11	"...should not construed to be such..."	Change to "should not be construed to be such"
39:15-16	"The fact that this issues is..."	Change to "The fact that this issue is"
45:6-7	"The fact that this issues is..."	Change to "The fact that this issue is"

PAGE:LINE	ERRATA/REFERENCE	REVISION
47:15-16	“The fact that this issues is...”	Change to “The fact that this issue is”
51:14	“The fact that this issues is...”	Change to “The fact that this issue is”
54:9-10	“Moreover, the FCC has recognized that the TRO only ‘basic’...”	Change to “Moreover, the FCC has recognized that the TRO notes only ‘basic’...”
55:9	“...by the offended party.”	Change to “...by the offended party.)”
55:n10	“There also may particular facts that bar (or should bar) and auditor form serving as an independent auditor.”	Change to “There also may be particular facts that bar (or should bar) an auditor from serving as an independent auditor.”
56:7	“The fact that this issues is...”	Change to “The fact that this issue is”

Last updated: 6/1/05

STATE OF SOUTH CAROLINA

)

CERTIFICATE OF SERVICE

)

COUNTY OF RICHLAND

)

The undersigned, Jeanette B. Mattison, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Motion to Strike All Testimony Presented by Mr. Hamilton Russell, III in Docket No. 2005-57-C to be served upon the following this June 14, 2005:

Florence P. Belser, Esquire
General Counsel
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211
(U. S. Mail and Electronic Mail)

Wendy B. Cartledge, Esquire
Staff Attorney
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211
(U. S. Mail and Electronic Mail)

F. David Butler, Esquire
Senior Counsel
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

Jocelyn G. Boyd, Esquire
Staff Attorney
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

Joseph Melchers
Chief Counsel
S.C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U.S. Mail and Electronic Mail)

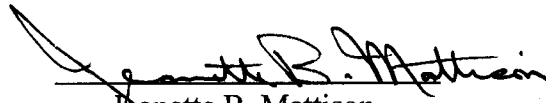
John J. Pringle, Esquire
Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202
(NewSouth, NuVox, KMC, Xspedius)
(U. S. Mail and Electronic Mail)

John J. Heitmann
Stephanie Joyce
Garrett R. Hargrave
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036
(U. S. Mail and Electronic Mail)

Bo Russell
Regional Vice President – Regulatory
and Legal Affairs SE
2 North Main Street
Greenville, South Carolina 29601
(NuVox/NewSouth)
(U. S. Mail and Electronic Mail)

Marva Brown Johnson
Senior Regulatory Policy Advisor
1755 North Brown Road
Lawrenceville, Georgia 30043
(KMC)
(U. S. Mail and Electronic Mail)

James C. Falvey
Senior Vice President – Regulatory Affairs
Xspedius
14405 Laurel Place, Suite 200
Laurel, Maryland 20707
(Xspedius)
(U. S. Mail and Electronic Mail)


Jeanette B. Mattison

PC Docs # 577384